

Robert W. Turken (*pro hac vice*)  
 Scott N. Wagner (*pro hac vice*)  
 Lori P. Lustrin (*pro hac vice*)  
 Shalia M. Sakona (*pro hac vice*)  
 Jerry R. Goldsmith (*pro hac vice*)  
 Ilana A. Drescher (*pro hac vice*)  
**BILZIN SUMBERG BAENA PRICE  
 & AXELROD LLP**  
 1450 Brickell Avenue  
 Suite 2300  
 Miami, FL 33131-3456  
 Telephone: (305) 374-7580

*Attorneys for Plaintiffs AASI, Avnet,  
 Benchmark Electronics, and Jaco*

Stuart H. Singer (*pro hac vice*)  
**BOIES SCHILLER FLEXNER LLP**  
 401 East Las Olas Blvd.  
 Suite 1200  
 Fort Lauderdale, FL 33301  
 Telephone: (954) 356-0011

William A. Isaacson (*pro hac vice*)  
**BOIES SCHILLER FLEXNER LLP**  
 1401 New York Ave., NW  
 Washington, DC 20005  
 Telephone: (202) 237-2727

*Attorneys for Plaintiff Arrow Electronics, Inc.*

Charles E. Tompkins (*pro hac vice*)  
**WILLIAMS MONTGOMERY & JOHN  
 LTD.**  
 1200 18th Street NW, Suite 325  
 Washington, D.C. 20036  
 Telephone: (202) 791-9951

*Attorney for Plaintiff Flextronics, Inc.*

**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA**

*In re Capacitors Antitrust Litigation*

**Case No. 17-md-02801-JD**

*This document relates to:*

*The AASI Beneficiaries' Trust, by and Through  
 Kenneth A. Welt, Liquidating Trustee, v. AVX  
 Corp. et al., Case No. 3:17-cv-03472-JD*

*Avnet, Inc. v. Hitachi Chemical Co., Ltd., et  
 al., Case No. 17-cv-07046-JD*

*Benchmark Electronics, Inc. et al. v.  
 AVX Corp. et al., Case No. 17-cv-07047-JD*

*Arrow Electronics, Inc. v. ELNA Co., Ltd.,  
 et al., Case No. 3:18-cv-02657-JD*

*Jaco Electronics, Inc. et al. v. Nippon Chemi-  
 Con Co. et al., Case No. 19-cv-01902-JD*

*Flextronics International USA, Inc.'s Action,  
 Case No. 3:14-cv-03264-JD*

**DIRECT ACTION PLAINTIFFS'  
 OPPOSITION TO DEFENDANTS  
 NIPPON CHEMI-CON CORP.'S AND  
 UNITED CHEMI-CON, INC.'S MOTION  
 FOR AN ORDER (I) ALLOWING  
 NORIAKI KAKIZAKI TO TESTIFY  
 SUBSTANTIVELY AT TRIAL AND (II)  
 PRECLUDING PLAINTIFFS FROM  
 OFFERING EVIDENCE OF MR.  
 KAKIZAKI'S PRIOR INVOCATION OF  
 HIS FIFTH AMENDMENT RIGHTS AT  
 AN EARLIER DEPOSITION**

Date: January 23, 2020

Time: 1:30 pm

Place: Courtroom 11, 19th Floor

Judge: Hon. James Donato

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
LEGAL STANDARD.....	2
ARGUMENT .....	3
I.    RELEVANT FACTUAL BACKGROUND.....	3
II.   MR. KAKIZAKI SHOULD NOT BE PERMITTED TO REVOKE HIS FIFTH AMENDMENT INVOCATION ON THE EVE OF TRIAL .....	4
CONCLUSION.....	7
CERTIFICATE OF SERVICE .....	8

**TABLE OF AUTHORITIES****Page(s)****CASES**

<i>Davis-Lynch, Inc. v. Moreno,</i> 667 F.3d 539 (5th Cir. 2012) .....	6
<i>Evans v. City of Chicago,</i> 513 F.3d 735 (7th Cir. 2008) .....	5, 6
<i>In re 650 Fifth Ave. &amp; Related Properties,</i> 934 F.3d 147 (2d Cir. 2019).....	6
<i>In re TFT-LCD (Flat Panel) Antitrust Litig.,</i> No. M07-1827SI, 2009 WL 4016124 (N.D. Cal. Nov. 9, 2009) .....	6, 7
<i>Nationwide Life Ins. Co. v. Richards,</i> 541 F.3d 903 (9th Cir. 2008) .....	2, 3, 5, 6
<i>United States v. \$133,420.00 in U.S. Currency,</i> 672 F.3d 629 (9th Cir. 2012) .....	2, 7

**PRELIMINARY STATEMENT**

In its “Motion for an Order (i) Allowing Noriaki Kakizaki to Testify Substantively at Trial and (ii) Precluding Plaintiffs from Offering Evidence of Mr. Kakizaki’s Prior Invocation of His Fifth Amendment Rights At An Earlier Deposition” (the “Motion”), NCC<sup>1</sup> insists that Mr. Kakizaki’s testimony is “central to the case” and “necessary to explain [d]ocuments and the related meetings and associated communications to the jury.” Mot. at 1. It is for exactly those reasons that NCC’s Motion should be denied.

According to NCC, in the fall of 2019, “as the parties were preparing for trial, NCC and UCC approached Mr. Kakizaki and asked if, in light of the *changed circumstances*, he would be willing to withdraw his prior invocation of his Fifth Amendment rights and testify substantively at the upcoming trial. Mr. Kakizaki agreed.” *Id.* (emphasis added).

But, NCC admits that those “changed circumstances” came more than a year and a half earlier—in May 2018, when NCC “resolved the criminal charges against it by entering into a plea agreement.” *Id.* As NCC further concedes, the DOJ represented in that plea agreement that it did not “contemplate the filing of any additional criminal charges against [NCC’s] current or former officers or employees based on the charge in the Indictment.” *Id.*

A year and a half later, in October 2019, NCC apparently informed the class plaintiffs (“DPPs”) that NCC’s employee, Mr. Kakizaki, now intends to withdraw the Fifth Amendment privilege he invoked during his August 2017 deposition and testify substantively at trial regarding his participation in the capacitors price-fixing conspiracy. According to NCC, Mr. Kakizaki’s testimony “will no doubt be helpful to the trier of fact.” Mot. at 6.

NCC’s decision to withhold the “critical information” it now says Mr. Kakizaki possesses was strategic. In fact, during NCC’s deposition preparation of its Rule 30(b)(6) corporate representative, Tomohiro Inoue, in February 2019, NCC chose not to have Mr. Inoue speak with Mr. Kakizaki. Instead, Mr. Inoue confirmed that his knowledge about the capacitors conspiracy was based solely on what his attorneys told him. Only now that discovery has long ended, summary judgment and *Daubert* briefing has concluded, and NCC is on the eve of trial, has NCC

---

<sup>1</sup> “NCC” refers to Defendants Nippon Chemi-Con and United Chemi-Con.

1 determined that the time is right to reveal Mr. Kakizaki's "critical information."

2 And, NCC is not done. In their October 30, 2019 letter to DPPs, NCC specifically stated:  
 3 "If, as the parties finalize their pre-trial filings, we decide to list any other witness who  
 4 previously invoked his Fifth Amendment rights, we will promptly provide notice and offer  
 5 deposition dates, should you wish to take that witness's deposition." During the meet and confer  
 6 call among counsel for DPPs, DAPs<sup>2</sup>, and NCC, NCC reiterated that they might "decide" to  
 7 request that additional NCC witnesses revoke the Fifth Amendment once NCC has reviewed  
 8 Plaintiffs' exhibit list and deposition designations.

9 NCC's attempt to withdraw Mr. Kakizaki's Fifth Amendment testimony—and leave the  
 10 door open indefinitely for future Fifth Amendment withdrawals at NCC's behest—is precisely  
 11 the "sword and shield" strategy that the Ninth Circuit has expressly prohibited. NCC's Motion  
 12 should be denied in all respects.

### 13 **LEGAL STANDARD**

14 The Ninth Circuit has long cautioned against a civil litigant's "improper use of the Fifth  
 15 Amendment privilege against self-incrimination as a sword as well as a shield." *United States v.*  
 16 *\$133,420.00 in U.S. Currency*, 672 F.3d 629, 640-41 (9th Cir. 2012) (citations omitted). "Trial  
 17 courts generally will not permit a party to invoke the privilege against self-incrimination with  
 18 respect to deposition questions and then later testify about the same subject matter at trial."  
 19 *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 910 (9th Cir. 2008).

20 "Because the privilege may be initially invoked and later waived at a time when an  
 21 adverse party can no longer secure the benefits of discovery, the potential for exploitation is  
 22 apparent. The rights of the other litigant must be taken into consideration when one party  
 23 invokes the Fifth Amendment during discovery, but on the eve of trial changes his mind and  
 24 decides to waive the privilege. At that stage, the adverse party—having conducted discovery and  
 25 prepared the case without the benefit of knowing the content of the privileged matter—would be  
 26 placed at a disadvantage." *Id.* (internal citations and quotation marks omitted). Specifically,

27 <sup>2</sup> "DAPs" refers to Direct Action Plaintiffs Avnet, Inc., The AASI Beneficiaries' Trust, by and  
 28 through Kenneth A. Welt, Liquidating Trustee, the Benchmark Electronics entities, Jaco  
 Electronics, Inc., Vermont Street Acquisition LLC, Flextronics, Inc., and Arrow Electronics, Inc.

1 “[t]he opportunity to combat the newly available testimony might no longer exist, a new  
 2 investigation could be required, and orderly trial preparation could be disrupted.” *Id.* (internal  
 3 citations omitted).

## 4 ARGUMENT

### 5 I. RELEVANT FACTUAL BACKGROUND

6 Mr. Kakizaki was deposed in August 2017. Mot. at 1. He was the fifth NCC fact witness  
 7 deposed in this case. Like each of the four witnesses who preceded him—and the three NCC  
 8 fact witnesses who followed him—Mr. Kakizaki invoked his Fifth Amendment rights to every  
 9 substantive question.

10 On January 25, 2018, this Court entered a limited stay of discovery for certain witnesses,  
 11 including NCC’s Rule 30(b)(6) witness, until the “earliest of (1) the first day of [NCC’s  
 12 criminal] trial, (2) the date that a guilty plea is accepted, or (3) a dismissal is entered by the  
 13 Court.” MDL ECF No. 26 (Minute Order). Fact discovery for DAPs otherwise closed on June  
 14 8, 2018. MDL ECF No. 171.

15 On May 10, 2018, NCC entered into a plea agreement in its criminal case, “resolv[ing]  
 16 the criminal charges against it.” Mot. at 1. As NCC acknowledges, the Department of Justice  
 17 (“DOJ”) represented in that plea agreement that it did “not contemplate the filing of any  
 18 additional criminal charges against [NCC’s] current or former officers or employees based on the  
 19 charge in the Indictment.” *United States v. Nippon Chemi-Con Corp.*, No. 4:17-CR-540-JD, ECF  
 20 No. 54 (Plea Agreement). This Court accepted NCC’s guilty plea on October 3, 2018, and the  
 21 limited discovery stay was lifted as of October 4, 2018. *See* No. 4:17-CR-540-JD, ECF No. 83  
 22 (Hearing Tr.); MDL ECF No. 345 (Order).

23 On February 20-21, 2019, the two-day deposition of Tomohiro Inoue, NCC’s Rule  
 24 30(b)(6) witness, took place. Mr. Inoue testified that his “knowledge and information” about  
 25 communications with competitors was not based on his personal knowledge, but rather, “facts  
 26 that [he] learned during the course of preparing for [his] deposition” with NCC’s counsel. *See*  
 27  
 28

Ex. A<sup>3</sup> (Feb. 20, 2019 Inoue Depo. Tr. Excerpt) at 46:18-25–47:1-19. When asked specifically whether he had spoken with Mr. Kakizaki in preparation for his deposition, Mr. Inoue answered: “I did not speak with him.” *Id.* at 47:22-23. Mr. Inoue gave the same response for each of the seven other NCC fact witnesses who also invoked their Fifth Amendment rights during their depositions.

By April 2019, the other previously stayed depositions were taken and in June 2019, expert discovery was completed. Summary judgment and *Daubert* briefing concluded in August 2019 and both NCC and its American subsidiary, UCC, filed separate motions for summary judgment. MDL ECF Nos. 565 (Order); 656 (NCC); 665 (UCC).

On October 22 and 23, 2019, NCC informed DPPs only that they intended to call Mr. Kakizaki to testify substantively at trial. MDL ECF No. 1045-2 (Berse Decl.) ¶ 6. In an October 30, 2019 letter to DPPs, NCC reiterated that intent. *See* Berse Decl. at Ex. 4. NCC also specifically stated: “If, as the parties finalize their pre-trial filings, we decide to list any other witness who previously invoked his Fifth Amendment rights, we will promptly provide notice and offer deposition dates, should you wish to take that witness’s deposition.” *Id.*

During a December 20, 2019 meet and confer call among counsel for all Plaintiffs and NCC, NCC repeated their statement that they might “decide” to request that additional NCC witnesses revoke the Fifth Amendment once NCC has reviewed Plaintiffs’ exhibit list and deposition designations. *See* Drescher Decl. ¶ 4. On January 2, 2020, the Court directed the parties to exchange deposition designations by January 21, 2020. MDL ECF No. 1061 (Hearing Tr.) at 21. Trial will begin on March 2, 2020. MDL ECF No. 1037 (Text Order).

## **II. MR. KAKIZAKI SHOULD NOT BE PERMITTED TO REVOKE HIS FIFTH AMENDMENT INVOCATION ON THE EVE OF TRIAL**

In its Motion, NCC concedes that, as they were preparing for trial in the fall of 2019, “NCC approached Mr. Kakizaki and asked if, in light of the changed circumstances, he would be willing to withdraw his prior invocation of his Fifth Amendment rights and testify substantively

---

<sup>33</sup> “Ex. \_\_” refers to the documents attached as Exhibits to the Declaration of Ilana Drescher (“Drescher Decl.”).



1 at the upcoming trial. Mr. Kakizaki agreed.” Mot. at 2. NCC also admits that the “changed  
2 circumstances” are the May 2018 plea agreement with the DOJ and the subsequent guilty plea  
3 accepted by this Court in October 2018—both of which occurred more than a year earlier. *Id.*

4 But nowhere in its motion does NCC explain why it did not attempt to produce Mr.  
5 Kakizaki for deposition in October 2018, once Mr. Kakizaki no longer faced a risk of criminal  
6 prosecution and the limited discovery stay was explicitly lifted.

7 NCC also fails to explain why it did not have its Rule 30(b)(6) corporate representative,  
8 Mr. Inoue, speak to Mr. Kakizaki in advance of Mr. Inoue’s deposition to learn the information  
9 NCC now proclaims “will no doubt be helpful to the trier of fact”; why instead, Mr. Inoue’s  
10 February 2019 testimony was based solely on information about the conspiracy he learned from  
11 NCC’s lawyers. Mot. at 6.

12 Indeed, taking NCC’s own representations in its Motion at face value, NCC made the  
13 conscious choice not to seek withdrawal of Mr. Kakizaki’s Fifth Amendment invocation until  
14 long after Mr. Kakizaki’s supposedly critical testimony could be pursued through further  
15 discovery. Now, NCC has attempted to shift that onus onto Plaintiffs, arguing that “Plaintiffs  
16 have never requested to reopen Mr. Kakizaki’s deposition.” Mot. at 4.

17 NCC does not cite—and DAPs cannot find—any cases that require a plaintiff to  
18 affirmatively request to “reopen” a deposition once a defendant has invoked his Fifth  
19 Amendment rights based on the plaintiff’s belief that a risk of prosecution may no longer exist.

20 Instead, on the eve of trial, NCC attempts to present Mr. Kakizaki as a substantive  
21 witness, now that Plaintiffs, “having conducted discovery and prepared the case without the  
22 benefit of knowing the content of the privileged matter—would be placed at a disadvantage.”  
23 *Nationwide*, 541 F.3d at 910. “The opportunity to combat the newly available testimony might  
24 no longer exist, a new investigation could be required, and orderly trial preparation could be  
25 disrupted.” *Id.* Specifically, because of NCC’s tactical delay, Plaintiffs will be deprived of the  
26 opportunity to take any follow up discovery or change their litigation strategy.

27 It is for these reasons that the cases NCC cites in its Motion are inapplicable. In each of  
28 the cases where the revocation of the Fifth Amendment privilege was permitted, the courts found



1 an “absence of gamesmanship.” *See, e.g., Evans v. City of Chicago*, 513 F.3d 735, 743 (7th Cir.  
 2 2008) (finding that the district court “reasonably could have concluded that the [witnesses who  
 3 revoked] were not ‘gaming’ the system but rather were concerned about the special prosecutor’s  
 4 investigation, which was only recently completed when they decided to testify.”).

5 Here, NCC’s behavior is the epitome of gamesmanship. The only “change” that NCC  
 6 points to is the language of the May 2018 plea agreement. Yet, NCC elected to wait a year and a  
 7 half after the plea agreement to seek the revocation of Mr. Kakizaki’s Fifth Amendment  
 8 invocation. And even now, NCC has stated that some time before trial it *may* decide to revoke  
 9 the Fifth Amendment privileges of some or all of its seven other fact witnesses.

10 Moreover, in the cases cited by NCC where revocation was allowed, the courts explicitly  
 11 considered whether there was ample opportunity to avoid any potential prejudice to the other  
 12 side. *See, e.g., In re 650 Fifth Ave. & Related Properties*, 934 F.3d 147, 170 (2d Cir. 2019)  
 13 (finding that district court should have “‘explore[d] all possible measures’ for accommodating  
 14 both parties,” when party provided notice “more than six months prior to trial—hardly the  
 15 ‘eleventh hour’—that they intended to call witnesses who had previously invoked the  
 16 privilege”).

17 In fact, NCC cites a case where the court actually *denied* a party’s request to revoke the  
 18 privilege because of unfair gamesmanship and potential prejudice. *See, e.g., Davis-Lynch, Inc. v.*  
 19 *Moreno*, 667 F.3d 539, 549 (5th Cir. 2012) (affirming the district court’s denial of Defendant’s  
 20 “eleventh-hour withdrawal of his Fifth Amendment privilege” because Defendant’s “withdrawal  
 21 of his Fifth Amendment privilege in response to [Plaintiff’s] motion for summary judgement  
 22 appears more likely to be an attempt to abuse the system or gain an unfair advantage” and  
 23 Defendant “withheld information that [Plaintiff] could have used in its investigation, only to  
 24 provide information at the last moment, leaving [Plaintiff] at a disadvantage.”).

25 Lastly, NCC relies on a pretrial decision in the *LCD Antitrust Litigation* to demonstrate  
 26 that courts “routinely exclude evidence of [Fifth Amendment] invocations, particularly where  
 27 live testimony is available.” Mot. at 6. But, *LCD* proves the opposite point. In that case, Judge  
 28 Illston specifically set forth the bright-line rule that “[a]ny person who at deposition asserts his or

her right under the Fifth Amendment of the United States Constitution not to testify will be bound by that assertion of the privilege and shall not be permitted to testify otherwise at trial unless, *not later than 60 days prior to the date set for the close of fact discovery*, notice is provided in writing of the intent to revoke the assertion of privilege and the willingness of the person to testify.” See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M07-1827SI, 2009 WL 4016124, at \*1 (N.D. Cal. Nov. 9, 2009) (emphasis added). This timing provided more than two months for any follow-up fact discovery to take place, and was well before any dispositive motion deadlines.

By contrast, NCC’s attempt to withdraw Mr. Kakizaki’s Fifth Amendment deposition at the eleventh-hour—and allow for the possibility of additional, even later revocations—is the paradigm of the “improper use of the Fifth Amendment privilege against self-incrimination as a sword as well as a shield” that the Ninth Circuit forbids. 672 F.3d at 640-41. NCC’s Motion should be denied in all respects.

### CONCLUSION

For the foregoing reasons, DAPs respectfully request that NCC’s Motion be denied.

DATED: January 6, 2019

/s/ Robert W. Turken

Robert W. Turken (*pro hac vice*)

Scott N. Wagner (*pro hac vice*)

Lori P. Lustrin (*pro hac vice*)

Shalia M. Sakona (*pro hac vice*)

Jerry R. Goldsmith (*pro hac vice*)

Ilana A. Drescher (*pro hac vice*)

**BILZIN SUMBERG BAENA PRICE &  
AXELROD LLP**

1450 Brickell Ave., Suite 2300

Miami, Florida 33131-3456

Telephone: 305-374-7580

Facsimile: 305-374-7593

*Attorneys for Plaintiffs AASI, Avnet,  
Benchmark Electronics, and Jaco*

/s/ Meredith Schultz

Stuart H. Singer (*pro hac vice*)

Meredith Schultz (*pro hac vice*)

**BOIES SCHILLER FLEXNER LLP**

401 East Las Olas Blvd.  
Suite 1200  
Fort Lauderdale, FL 33301  
Telephone: (954) 356-0011  
Facsimile: (954) 356-0022  
Email: ssinger@bsfllp.com  
Email: mschultz@bsfllp.com

Philip J. Iovieno (*pro hac vice*)  
Anne M. Nardacci (*pro hac vice*)

**BOIES SCHILLER FLEXNER LLP**

30 South Pearl Street, 11th Floor  
Albany, NY 12207  
Telephone: (518) 434-0600  
Facsimile: (518) 434-0665

William A. Isaacson (*pro hac vice*)

Kyle Smith (*pro hac vice*)

**BOIES SCHILLER FLEXNER LLP**

1401 New York Ave., NW  
Washington, DC 20005  
Telephone: (202) 237-2727

*Attorneys for Plaintiff Arrow  
Electronics, Inc.*

Charles E. Tompkins (*pro hac vice*)

**WILLIAMS MONTGOMERY  
& JOHN LTD.**

1200 18th Street NW, Suite 325  
Washington, D.C. 20036  
Telephone: (202) 791-9951  
Facsimile: (312) 630-8586  
Email: cet@willmont.com

Paul J. Ripp (*pro hac vice*)

**WILLIAMS MONTGOMERY & JOHN  
LTD.**

233 S. Wacker Drive, Suite 6800  
Chicago, IL 60606  
Telephone: (312) 443-3200  
Facsimile: (312) 630-8500  
Email: pjr@willmont.com

*Attorneys for Plaintiff Flextronics  
International USA, Inc.*

**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that a true and correct copy of the foregoing document was electronically served upon the parties and counsel of record system on January 6, 2019.

/s/ Robert W. Turken

Robert W. Turken